No. 95-1872

In the Supreme Court of the United States

OCTOBER TERM, 1996

WILLIAM STRATE, ASSOCIATE TRIBAL JUDGE, TRIBAL COURT OF THE THREE AFFILIATED TRIBES OF THE FORT BERTHOLD INDIAN RESERVATION, ET AL., PETITIONERS

v.

A-1 CONTRACTORS AND LYLE STOCKERT, RESPONDENTS

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR THE AMERICAN TRUCKING ASSOCIATIONS, INC., THE AMERICAN AUTOMOBILE ASSOCIATION, AND BURLINGTON NORTHERN RAILROAD COMPANY AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Amici address the following question:

Whether the Tribal Court of the Three Affiliated Tribes had subject matter jurisdiction over a tort claim against a non-Indian arising out of an accident occurring on a permanent, federally-granted right-of-way located within the boundaries of the Fort Berthold Reservation?

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INTEREST OF THE AMICI*

The American Trucking Associations, Inc. ("ATA"), the American Automobile Association ("AAA"), and Burlington Northern Railroad Company ("BN") appear in this case as amici because they have a vital interest in ensuring that tort claims arising out of accidents occurring on federal rights-of-way within the boundaries of an Indian reservation are adjudicated fairly, in a manner that fully comports with fundamental principles of due process.

ATA is the national trade association of the trucking industry. Through 51 affiliated state trucking associations (located in every state and the District of Columbia), 14 affiliated national organizations and more than 4,500 direct member companies, ATA represents over 34,000 motor carriers and trucking suppliers, including both for-hire and private carriers, insurance companies, truck leasing companies, and equipment manufacturers. Members of the nation's trucking fleet frequently travel over Indian lands as they transport freight and commodities throughout and across the western United States. ATA regularly advocates the trucking industry's common interests before this Court and other courts.

AAA is a non-profit federation of 102 motor clubs, representing more than 39 million motorists in the United States and Canada. Nearly 23 percent of the passenger vehicles registered in the U.S. and Canada belong to AAA members. These members are served by a network of more than 1,000 AAA offices, which provide travel, insurance, financial and automotive services.

BN is one of the nation's largest railroads. Operating on rights-of-way granted by the federal government more than a century ago, BN's trains cross 27 different Indian reserva-

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* The consents of the parties to the filing of this amicus brief are on file with the Clerk.

tions each day in the western United States. Members of ATA and AAA are also required, on a daily basis, to traverse many different reservations on state and federal highways which, like the state highway where the accident occurred in this case, are located on permanent rights-of-way granted across reservation lands. Avoiding contacts with Indian reservations is a practical and legal impossibility for BN, which cannot relocate its tracks. It is also difficult, if not impossible, for ATA and AAA members to avoid crossing reservation lands on a regular basis as they travel on major highways in the West.[1]

BN and the members of ATA and AAA strive to avoid accidents; yet accidents do occur. If petitioners in this case were to prevail on their theory of territorial sovereignty, BN and other non-Indians who have no choice but to cross reservation lands would always be subject to tribal court jurisdiction whenever an accident occurred within the boundaries of any reservation that has its own tribal court. That result is deeply troubling because tribal courts are inherently ill-suited to provide a fair and impartial forum for the adjudication of substantial tort claims against outsiders.

Tribal courts were established for the primary purpose of adjudicating civil and minor criminal disputes among members of the tribe. As a result, many, if not most, tribal codes limit participation on juries to members of the tribe. Even if the available jury pool includes non-members who live on the reservation, most reservations are by their very nature relatively small and close-knit communities. When the litigation concerns criminal matters or a dispute between members of the tribe, the insular nature of the tribal court

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[1] A good example is Interstate 25, which crosses four different Indian reservations in the sixty-mile stretch between Albuquerque and Santa Fe, New Mexico.

does not pose any particular problem. On the contrary, the tribal court is uniquely qualified to apply the often unwritten laws and customs of the tribe. But when the dispute is a tort claim, often seeking very large damages, brought by a member of the tribe (or, as here, a long-time resident of the reservation) against a non-Indian outsider, the tribal court can all too easily become a vehicle for the deprivation of the outsider's right to due process.

This is not just an abstract fear. In 1995, BN was sued in tribal court on the Crow Reservation in Montana by the survivors of two members of the tribe killed in a railroad crossing accident on the reservation. *Red Wolf v. Burlington Northern R.R.*, Civ. No. 94-31 (Crow Tribal Ct.). In 1996 the case was tried to a jury made up entirely of members of the tribe, including some who were relatives of the plaintiffs. During jury selection, many potential jurors expressed a deep-seated bias against the railroad. That bias was echoed by the court itself when a judge (who was not presiding over the case) addressed the venire panel in the Crow language, telling them

> "A train runs through the middle of our land, Crows, you know, I don't have to tell you. Bodies, in the past, bodies are scattered along the railway. Now, this is the day."

Although the evidence showed that the driver and her mother were intoxicated at the time of the accident, the jury found BN 100% liable for wrongful death and awarded the five heirs what the jury described as "compensatory" damages in the astonishing amount of $250 million.[2]

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[2] After the tribal court refused to stay enforcement of the judgment unless BN put up security for the entire amount, BN sought and obtained a federal court injunction against enforcement. Plaintiffs appealed to the Ninth Circuit, where the case was argued in September 1996. *Burlington*

Although BN's experience may be the most outrageous example of the potential for abuse in the tribal court system, it is by no means an isolated phenomenon. In *Wilson v. Marchington*, No. 96-35145 (9th Cir.), the Blackfeet Tribal Court awarded the plaintiff approximately $250,000 for injuries she suffered when defendant's truck collided with plaintiff's vehicle while passing through the reservation on U.S. Highway 2. Complaining of, among other things, the assertion of tribal court jurisdiction, the defendant appealed to the recently created Blackfeet Supreme Court—only to be faced with a judge who, as a practicing lawyer in the tribal courts, represented clients on the opposite side of the very jurisdictional issue he was asked to decide.[3]

Amici believe that the concept of retained sovereignty and tribal self-government cannot be stretched to include jurisdiction over tort claims arising out of any and all events that happen to occur on the reservation. On the contrary, in light of the historical record, this Court's own precedents, and legitimate concerns for protecting the rights of non-Indian defendants, amici urge the Court to adopt instead a rule that would preclude tribal court jurisdiction, absent the defendant's consent, over tort claims against non-Indians arising out of accidents on state or federal rights-of-way.

SUMMARY OF ARGUMENT

I. Contrary to the impression petitioners and the amici who support them try to create, this Court has never held that tribal courts have presumptive jurisdiction over all claims arising out of all accidents occurring within the

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Northern R.R. v. Estates of Red Wolf and Bull Tail, Nos. 96-35254 and 96-35265.

[3] The U.S. district court in Montana ordered enforcement of the tribal court judgment; that decision is currently on appeal to the Ninth Circuit.

boundaries of the reservation. Throughout their brief, petitioners confuse this Court's general pronouncements about a tribe's authority over its lands and members with the question of tribal jurisdiction over non-Indians. In case after case, this Court has made it clear that the tribes' retained jurisdiction over non-Indians is narrowly limited and can be invoked only in situations where there is consent or where the exercise of jurisdiction is vital to the ability of the tribe to govern or protect itself. *See Montana v. United States*, 450 U.S. 544 (1981).

The general presumption against tribal jurisdiction articulated in *Montana* is not limited, as petitioners contend, to the "regulatory"—as opposed to the "adjudicatory"—context. Nor is it limited to situations where an accident occurs on land held in fee by non-Indians. A tribe's power to regulate the conduct of non-Indians is a function not of the ownership of the land where the conduct occurs, but rather of the tribe's ability to exclude non-Indians from using the land. In *South Dakota v. Bourland*, 508 U.S. 679, 691 n.11 (1993), this Court explained that "regulatory authority goes hand in hand with the power to exclude." When the power to exclude non-Indians from the land is eliminated, so too is the "incidental regulatory jurisdiction formerly enjoyed by the Tribe." *Id.* at 689. In this case, the Tribes gave up any right to exclude outsiders from the state highway where the accident occurred when they consented to the federal grant of a perpetual easement to the State. Having given up the right to exclude outsiders, the Tribes also necessarily gave up whatever jurisdiction they might otherwise have had over those outsiders.

II. The only exceptions to this basic rule are those set forth in *Montana*. Petitioners and their amici urge the Court to construe the *Montana* exceptions in the broadest possible manner so that they effectively swallow the rule. Instead, the exceptions should be construed narrowly in accordance with

the general presumption against tribal jurisdiction articulated in *Montana*. Thus, consent to tribal court jurisdiction should be found only where there is *actual* consent to adjudication of a particular claim or class of claims in tribal court. And, if the second *Montana* exception applies at all in this context, tort claims should never be found to implicate the tribe's ability to protect itself except in those rare cases where it can be shown that the established tort system existing outside the boundaries of the reservation is inadequate to protect an important tribal interest.

III. The historical record, including treaties and agreements between the Three Affiliated Tribes and the United States, fully supports the conclusion that tribal courts have no jurisdiction over non-Indians in the absence of consent. In their brief, petitioners ignore the history of the relationship between the Tribes and the United States government, focusing instead on metaphysical concepts of sovereignty. A review of the historical record, however, leads inevitably to the conclusion that, at the time the Tribes were incorporated into the territory of the United States and became "dependent sovereigns," no one believed that tribal courts would exercise jurisdiction over claims by members of the Tribes against non-Indians. Instead, the assumption was that non-Indians would enter onto Indian lands only if specifically authorized to do so by the United States Government and that any injuries inflicted on members of the Tribes by outsiders would be remedied by the United States Government.

IV. Because there are serious due process problems with the extension of tribal court jurisdiction over tort claims against non-Indians, this Court should be particularly careful not to stretch to find retained jurisdiction. By their very nature, tribal courts are ill-suited to adjudicate claims by members of the tribe or their families against outsiders. Furthermore, because the extent of judicial review available outside of the tribal court system is far from clear, there are

no real constraints on tribal courts to ensure that all litigants, including non-Indian defendants, are afforded due process and equal protection of the law.

V. Uncertainty over both the extent of tribal court jurisdiction and the availability of federal or state court review of tribal court judgments, combined with the exhaustion rule adopted by this Court in *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845 (1985), has created a quagmire for litigants on both sides of disputes arising out of accidents on Indian reservations. This Court can and should resolve at least some of that uncertainty now, by adopting a bright-line test limiting tribal court jurisdiction of tort claims against non-Indians to situations where the defendant has explicitly consented to such jurisdiction. At the very least, such a rule should be adopted for tort claims arising out of accidents on federally-granted rights-of-way, enabling such claims to be resolved in a prompt and fair manner for all parties concerned, without lengthy disputes over the proper forum.

ARGUMENT

I. This Court Has Repeatedly Held That Tribal Jurisdiction Over Non-Indians Is Narrowly Limited.

In their briefs, petitioners and their amici quote every statement this Court has ever made to the effect that Indian tribes retain jurisdiction over their lands and members. With the possible exception of the dicta in *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 18 (1987), however, the Court has never even remotely suggested that tribal courts presumptively have subject matter jurisdiction over non-Indians whenever an accident arises within the external boundaries of the

reservation.[4] On the contrary, there is a whole line of authority, which petitioners and the amici supporting them largely ignore, holding that there is a presumption *against* tribal power over the activities of non-Indians.

In *Montana v. United States*, 450 U.S. at 563-64, this Court explained that "through their original incorporation into the United States as well as through specific treaties and statutes, the Indian tribes have lost many of the attributes of sovereignty." One of the attributes that has been lost is the ability to control the tribe's relationship with outsiders. As the Court explained in *United States v. Wheeler*, 435 U.S. 313, 326 (1978), the status of Indian tribes as protected and dependent sovereigns "is necessarily inconsistent with their freedom independently to determine their external relations." Thus, any analysis of the limits of tribal power over non-Indians must begin, not with the concept of territorial sovereignty, but rather with the "general proposition that the inherent sovereign powers of an Indian tribe do *not* extend to the activities of nonmembers of the tribe." *Montana*, 450 U.S. at 565 (emphasis added); *see also Wheeler*, 435 U.S. at 326 (tribes have been implicitly divested of the power to control "the relations between an Indian tribe and nonmembers of the tribe").

Indian tribes do retain limited sovereign powers, which relate to the "powers of self-government * * * [and] involve

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[4] *Iowa Mutual* was an exhaustion case; the Court did not purport to be deciding the question of tribal jurisdiction. Indeed, it specifically disclaimed any intention of doing so, deferring to the tribal court to make that determination in the first instance. 480 U.S. at 18. In any event, as the Eighth Circuit majority pointed out, far from rejecting the rule in *Montana v. United States*, which we rely upon, the Court in *Iowa Mutual* specifically cited *Montana* as controlling authority in the very passage petitioners quote as evidence that *Montana* does not apply in the adjudicatory context. 480 U.S. at 18.

only the relations among members of a tribe." *Wheeler*, 435 U.S. at 326. These retained sovereign powers include "the power to punish tribal offenders, * * * [the] inherent power to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members." *Montana*, 450 U.S. at 564. But the "exercise of tribal power *beyond what is necessary to protect tribal self-government or to control internal relations* is inconsistent with the dependent status of the tribes, and so cannot survive without *express* congressional delegation." *Id.* (emphasis added). *See also Bourland*, 508 U.S. at 695 n.15 (citation omitted), where the Court emphatically rejected the claim that tribes have inherent sovereign power over non-members within their geographic boundaries with the observation that such an argument "shuts both eyes to the reality that after *Montana*, tribal sovereignty over nonmembers 'cannot survive without express congressional delegation,' and is therefore not inherent."

Petitioners and their amici have offered a number of reasons why *Montana* should not apply here. They contend that it was wrongly decided or should be limited to its facts. They also argue that *Montana* applies only to the tribes' regulatory authority and not to their ability to adjudicate disputes. Petitioners' main contention, however, seems to be that *Montana* applies only to conduct on land owned in fee by non-Indians and that the tribes retain plenary jurisdiction over activities on land that remains under tribal ownership. Because the Tribes in this case continue to have a reversionary interest in the land underneath the state highway, petitioners contend that the limitations on tribal jurisdiction articulated in *Montana* do not apply.

All of these arguments should be rejected. Far from being wrongly decided, *Montana* accurately reflects the historical reality surrounding the tribes' surrender of full sovereignty to the United States. (See Part III below). The

rationale in *Montana* also cannot be limited to the regulatory context. If a tribe's inherent sovereign powers do not extend to regulating the conduct of non-Indians, it necessarily follows that the tribe does not have the power to use its judicial system to force a non-Indian to pay damages for any alleged misconduct. In a very real sense, the power to impose damages *is* the power to regulate. The Court recognized that fact in *Williams v. Lee*, 358 U.S. 217 (1959), when it held that a state court could not entertain claims against an Indian defendant arising out of activities on the reservation because state court adjudication of such claims would infringe on the tribe's ability to govern itself.[5]

Petitioners' claim that *Montana* applies only to activities on fee land owned by non-Indians must also be rejected. The Court in *Montana* did not suggest that the limits it recognized on tribal sovereignty are a function of the ownership of the land where the activities in question occurred. Rather, the discussion in *Montana* revolved around the nature of the limited sovereignty retained by the tribes over non-Indians even on their own reservations. The Court quoted and relied

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[5] Petitioners cite *Williams* as authority for the proposition that tribal courts have jurisdiction over *all* claims arising on the reservation, including claims against non-Indians who have not consented to such jurisdiction. The Court in *Williams*, however, did not purport to announce any such broad principle. On the contrary, the Court specifically recognized that the interest in tribal self-government is *not* implicated in situations where claims are brought against a non-Indian. That is true even if the claims arose on the reservation. Thus, the Court observed that state courts could properly assert jurisdiction over suits "by Indians against outsiders" without invading the tribes' ability to govern themselves. 358 U.S. at 219. *See also Three Affiliated Tribes v. Wold Engineering, P.C.*, 476 U.S. 877, 880 (1986), where the Court made the same distinction, noting that a state court could properly recognize "jurisdiction over the claims of Indian plaintiffs against non-Indian defendants * * * because such jurisdiction did not interfere with the right of tribal Indians to govern themselves."

on "Justice Johnson's words in his concurrence in *Fletcher v. Peck*, 6 Cranch 87, 147, 3 L.Ed. 162—the first Indian case to reach this Court—that the Indian tribes have lost any 'right of governing every person within their limits except themselves.'" 450 U.S. at 565. It then categorically described "the general proposition" as being that "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." *Id.* The Court went on to list what have become known as the "*Montana* exceptions" to this presumption, prefacing its description with the statement that "[t]o be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands." *Id.* The clear implication of this statement is that the *only* jurisdiction the tribes' retain over non-Indians—regardless of where they are located on the reservation—is the limited jurisdiction described in the *Montana* exceptions.

In any event, even if the scope of tribal jurisdiction depended on the nature of the land where the conduct in question occurred, the *Montana* presumption against tribal jurisdiction would still apply in this particular case. The cases subsequent to *Montana* make clear that the key issue in deciding whether a tribe has the power to regulate the use of lands located within the boundaries of the reservation is not who *owns* the land, but rather whether the tribe retains the right to exclude outsiders from using it. In *Bourland*, 508 U.S. at 691 n.11, the Court observed that "regulatory authority goes hand in hand with the power to exclude"; consequently, where, as a result of federal action, a tribe has lost the right to exclude non-Indians from particular lands within the reservation, the tribe ordinarily will not have the power to regulate the use of those lands.

In this case, the United States continues to hold the fee interest in the land underneath the highway for the benefit of the Tribes. But the Tribes' interest in the land is "only a

right of occupancy," *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 667 (1974). The Tribes gave that right up more than twenty years ago when they consented to the federal grant of an easement to the State of North Dakota pursuant to the Indian Rights-of-Way Act, 25 U.S.C. §§ 323-328. That grant, which is reproduced in the Appendix to respondents' brief, gives the State a perpetual right to use the land so long as it is used as a highway. The Tribes retain a reversionary interest, but only in the event that the State surrenders or abandons the right-of-way. Having consented to the easement, the Tribes gave up whatever rights they would otherwise have had to exclude anyone from using the highway.

The federal grant of a perpetual easement to the State is indistinguishable from the federal taking of tribal land for flood control purposes that this Court found in *Bourland* to be inconsistent with continuing tribal regulation. Indeed, in that case, the tribe retained much greater rights to continued use of the land than the Tribes have in this case.[6] The Court recognized that the retention of these rights made the transfer of land different than the transfer of the entire fee interest to a non-Indian in *Montana*. Nevertheless, the Court concluded that the result was the same: "when Congress has broadly opened up such land to non-Indians, the effect of the transfer is the destruction of pre-existing Indian rights to regulatory control." 508 U.S. at 692.

Thus, whether *Montana* is viewed as establishing a general presumption against tribal jurisdiction over non-Indians or as establishing a narrower presumption against tribal jurisdiction over activities on land that the tribe no

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[6] The Cheyenne River Tribe retained mineral rights, as well as grazing, access, hunting and fishing rights. *Bourland*, 508 U.S. at 684.

longer controls, the result in this case will be the same.[7] Either way, the Court must begin with the presumption that there is no tribal court jurisdiction over claims arising out of accidents on a state highway, unless the proponent of tribal court jurisdiction can demonstrate that one of the *Montana* exceptions applies.

II. The Eighth Circuit Properly Concluded That The *Montana* Exceptions Do Not Apply.

Petitioners argue that, even if the *Montana* rule applies in this case, the exceptions to that rule support the invocation of tribal court jurisdiction. The Court in *Montana* explained that tribes retained the power to regulate "the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." 450 U.S. at 565. The Court stated that tribes "may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id.* at 566. Petitioners argue that both exceptions apply here because (i) A-1 Contractors was on the reservation in order to perform a contract it had entered into with a company owned by the Tribes and (ii) the Tribes have a political interest in providing a forum for injured reservation residents and a regulatory

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[7] Because consent is one of the exceptions to the presumption against tribal jurisdiction over non-Indians, there is no real difference between these two alternatives. If the tribe retains the ability to exclude outsiders from particular lands, it can condition the right to use that land on a non-Indian's agreement to abide by the rules set by the tribe. Thus, the "consent" requirement of the first *Montana* exception is likely to be satisfied whenever the tribe retains the right to exclude others from the land in question.

interest in policing negligent behavior on highways running through the reservation.

The Eighth Circuit properly rejected all of these arguments. Petitioners contend that by entering into a contract with the Tribes, A-1 should be deemed to have constructively agreed to submit to the jurisdiction of the tribal court for any tort claims arising out of its presence on the reservation. Petitioners' concept of "consent" to tribal court jurisdiction, however, is vastly overbroad. Taken to its logical conclusion, that concept would subject anyone who entered the boundaries of the reservation to tribal court jurisdiction for any type of claim on the ground that their very presence on the reservation represented constructive consent to any foreseeable lawsuit. Such an exception would swallow the basic rule established in *Montana* that tribes ordinarily will not have jurisdiction over the activities of non-Indians.

To the extent that tribal jurisdiction can be conferred by consent, it should be *real* consent. A non-Indian who enters into a contract with the tribe or a member of the tribe that specifically provides for submission to tribal court jurisdiction should be bound by that agreement. But without such explicit consent, the mere fact that the non-Indian was on the reservation pursuant to a consensual relationship is not enough to confer jurisdiction on the tribal courts over all conceivable claims arising out of the non-Indian's presence on the reservation. That ought to be particularly true in this case, where the contract between A-1 Contractors and the tribal company contained an exclusive forum selection clause selecting the state court in Utah as the forum for any contractual disputes. (J.A. 111 n.5). Having agreed to litigate contract disputes in a state court, A-1 Contractors can hardly be deemed to have "consented" to tribal court jurisdiction over any foreseeable tort claims arising out of its presence on the reservation.

The second *Montana* exception also does not apply. Plaintiffs' claim that jurisdiction over tort claims is necessary to preserve their political integrity as sovereigns—apart from being hopelessly circular—is limitless, allowing tribal courts to assume jurisdiction over any claim raised by a reservation resident. Similarly, petitioners' claim that jurisdiction must be recognized in order to enable the Tribes to protect the health and welfare of their members would allow a tribe to exercise civil jurisdiction over all accidents that occur on state or federal highways and, indeed, over virtually any tort claim, simply by asserting an interest in discouraging negligent and other wrongful conduct on the reservation.[8] Such an interpretation of the second *Montana* exception is directly contrary to the fundamental premise of the *Montana* decision, which is that the tribes' status as dependent sovereigns necessarily entails a sharp limitation on their jurisdiction over non-members.

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[8] Indeed, this rationale could be used to allow tribal courts to assume jurisdiction over non-Indians who had never even set foot on the reservation, on the theory that, under principles akin to long-arm jurisdiction, a tribal court has jurisdiction over off-reservation activities that have an impact on the reservation. That such lawsuits are a possibility is not idle speculation. The Tribal Code of the Three Affiliated Tribes specifically provides for long-arm jurisdiction. *See* J.A. 22. There is currently pending in the Rosebud Sioux tribal court a lawsuit brought by the heirs of Chief Crazy Horse against the makers of Crazy Horse malt liquor seeking damages for the misappropriation of his name. Although the manufacturer is not a resident of the reservation and the product is not even sold in South Dakota, where the reservation is located, the Rosebud Sioux Supreme Court recently reversed a trial court ruling that it lacked personal jurisdiction over the manufacturer. *The Ethnic Newswatch*, Vol. 17, No. 8 at 13 (Aug. 31, 1996); *see also The Ethnic Newswatch*, Vol. 8, No. 36 at 3 (June 21, 1996).

If the second *Montana* exception is to be applied at all to the question of the scope of tribal court jurisdiction,[9] it should be applied narrowly, to ensure that tribal court jurisdiction is in fact allowed only in those rare cases where the particular conduct in question has in fact had a substantial impact on the tribe as a whole. The Eighth Circuit properly recognized that traffic accidents, by their very nature, do not meet this standard because they impact only the individual and not the tribe as a whole.

Even in situations where an effect can be found on the tribe as a whole, however, that should not be enough, in and of itself, to give the tribe the power to adjudicate claims against a non-Indian. Virtually all tortious acts are already covered by the web of obligations created by the common law, and remedies are available in state and federal court for breach of those obligations. There is no reason to believe that reservation residents are not already adequately protected by existing state laws and state remedies. Thus, a tribe has no need to provide a forum for claims against non-Indians in order to protect the health or welfare of its members as a whole or its interest in tribal self-government.

To hold otherwise would create a potentially chaotic situation where tribal courts would be able to "regulate" the conduct of non-Indians on state and federal highways and other federally-granted rights-of-way by, among other things, developing their own individual tort systems governing

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[9] In their amicus brief, a number of States, through their Attorneys General, demonstrate why the second *Montana* exception should not apply at all to tribal court jurisdiction of tort claims against non-Indian defendants.

accident claims.[10] For if tribal courts were deemed to have a sufficient interest in reducing accidents on those rights-of-way to give them adjudicatory jurisdiction over non-Indians under the second *Montana* exception, it necessarily follows that they would also have a strong enough interest to formulate and apply their own law in deciding liability and imposing damages for such accidents. Indeed, the Constitution adopted by the Three Affiliated Tribes specifically limits the jurisdiction of the tribal court to cases and controversies arising under tribal law and provides that tribal law will be applied in tribal court.[11] Thus, it necessarily follows that, if it has jurisdiction over the claims at issue in this case, the tribal court will apply its own law.

In his amicus brief, the Solicitor General urges the Court to postpone for another day the question whether the Tribes may properly apply their own law if the Court concludes that

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[10] If the health and safety rationale applied, as petitioners claim, the Tribes would also have the power to directly regulate conduct on the highway by, for example, reducing speed limits, putting up traffic signals, or even excluding certain types of vehicles from the roads. Such an exercise of regulatory authority would be fundamentally at odds with the grant of a permanent easement to the State, which gave the State—and not the Tribes—the power to regulate the highway.

[11] Section 2.1 of the Constitution vests the judicial power of the tribe in the Fort Berthold Judiciary and provides that that power "shall extend to all cases and controversies in law, equity, and custom arising under the Laws of the Three Affiliated Tribes." Section 2.5, which is headed "Applicable Law," provides that, in the absence of controlling federal law or tribal ordinance, "the judge may seek authority in the custom, usage, and jurisprudence of the Tribes." That section also provides that state and federal laws that are not applicable to the reservation shall "not be deemed applicable law in any proceeding," except as provided by stipulation of the parties with the consent of the Court; even then, state and federal laws are not to be given any greater authority than tribal laws or customs or usage.

the tribal court has jurisdiction over Mrs. Frederick's claim. But that is potentially a critical question, not only from a legal perspective, but also from a practical point of view. There is a patchwork quilt of Indian reservations throughout the western United States; allowing each tribe to develop its own individual tort law, in addition to the existing state laws, would create a nightmare of conflicting rules.[12]

There may be rare situations where state and federal court remedies are insufficient to protect a strong tribal interest against a non-Indian's allegedly tortious activity on the reservation. But ordinary traffic accidents do not require a unique tribal court remedy and thus should never be deemed to fall within the second *Montana* exception.

III. The Historical Record Compels The Conclusion That The Three Affiliated Tribes Have No Civil Jurisdiction Over Non-Indians In The Absence Of Consent.

The briefs filed in support of petitioners are filled with rhetoric about tribal sovereignty. Yet none of those briefs addresses the most important factor in determining the extent to which a tribe has retained its original sovereignty: the historical record surrounding the tribe's surrender of its sovereignty to the United States. The question of how much sovereignty was "retained" by the tribe is essentially a question of the intent of the tribe and the United States Government. If civil jurisdiction was surrendered, along with other aspects of the tribe's sovereignty, more than a century

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[12] The notion that tribal courts might apply fundamentally different standards in judging tort claims is not at all far-fetched. Lawyers for the plaintiffs in the *Red Wolf* case have sought to justify the huge damages for loss of society imposed by the Crow tribal court on the ground that the verdict is based on the Crows' unique perspective on the value of human life.

ago, it necessarily follows that it cannot be revived now absent an express Act of Congress.

This Court recognized the importance of the historical record in *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845 (1985). In that case, the Court declined to adopt a bright-line jurisdictional rule for civil tribal court jurisdiction, stating that

> the existence and extent of a tribal court's jurisdiction will require a careful examination of tribal sovereignty, the extent to which that sovereignty has been altered, divested, or diminished, as well as a detailed study of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions.

Id. at 855-56. When such an examination is conducted in this case, it becomes apparent that the Three Affiliated Tribes did not retain civil jurisdiction over non-Indians for traffic accidents occurring on a state highway located on the reservation.

The three tribes who together occupy the Fort Berthold reservation entered into three virtually identical treaties with the United States in 1825. *See* 7 Stat. 259, 7 Stat. 261, and 7 Stat. 264. Significantly, those treaties do not purport to give the Tribes the power to exclude non-members from Indian lands. Instead, they give the United States the explicit power to decide who other than members of the Tribes would be allowed to pass through or reside on the reservation.[13]

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[13] In Article 5 of each treaty the Tribes agreed to extend protection to the persons and property of traders licensed by the United States, as well as to anyone legally authorized by the United States to pass through their country or "sent by the United States to reside temporarily among them." The Tribes also agreed to "apprehend" any person *not* authorized by the

There is no provision in the treaties that recognizes any power on the part of the Tribes to adjudicate disputes involving non-Indians. On the contrary, the treaties explicitly contemplate that the United States Government would resolve any disputes. Disclaiming reliance on "private revenge or retaliation" "for injuries done by individuals," the Tribes agreed that "complaints shall be made, by the party injured, to the superintendent or agent of Indian affairs or other person appointed by the President." Treaties, Article 6. The United States agreed to punish anyone who was not a member of the Tribes for any offense against an Indian "as if the injury had been done to a white man." *Id.* It also agreed to provide full indemnification for any horses or other property stolen by a citizen of the United States from a member of the Tribes. *Id.*

The 1825 treaties were entirely consistent with the"common notions of the day," *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 206 (1978), which assumed that tribes would never have nonconsensual jurisdiction—civil or criminal—over non-Indians. Beginning with the Treaty with the Cherokee in 1798, 7 Stat. 62, federal statutes and treaties routinely provided for adjustment of claims against non-Indians by the U.S. Government, rather than by the tribes themselves.[14] In the face of a flood of claims by Indians

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United States to enter into their country and turn him over to the Indian agent or some other representative of the United States government.

[14] *See, e.g.*, Act of March 30, 1802, ch. 13, §§ 4 & 14, 2 Stat. 139 (providing indemnification for the loss or damage suffered by either race as a result of acts of the other); Treaty with the Sauk and Foxes, 1804, 7 Stat. 84; Treaty with the Osage, 1808, 7 Stat. 107; Treaty with the Quapaw, 1818, 7 Stat. 176. Later treaties contained similar provisions, providing that Indians who suffered personal injury or property damage as a result of the conduct of non-Indians would submit claims to an Indian agent, who would then forward them to the Commissioner of Indian

seeking indemnity for stolen property and other injuries, the War Department issued instructions to all Indian agents standardizing claims-handling procedures. F. PRUCHA, AMERICAN INDIAN POLICY IN THE FORMATIVE YEARS: THE INDIAN TRADE AND INTERCOURSE ACTS 1790-1834 at 208 (1962). Agents were instructed to forward a report on the Indian's claim both to the War Department and to the "District Attorney where the [non-Indian] person who has done the injury resides," explaining the claim so that "proper legal steps may be taken against the wrong-doer." Circular to Superintendents and Agents (Sept. 5, 1818), quoted in PRUCHA, *supra*, at 209. See also the 1834 Trade and Intercourse Act, ch. 161, § 16, 4 Stat. 729, 731.

Even the 1855 Opinion by Attorney General Cushing, 7 Op. Atty Gen. 174, which is often cited as a contemporary recognition of tribal court civil jurisdiction over non-Indians, suggests that such jurisdiction was limited to situations where a non-Indian had consented by effectively becoming a member of the tribe. In that case, the question presented was whether a tribal court had jurisdiction "over a white man who has voluntarily made himself a Chicasaw by intermarriage and exercise of all the rights of a Chicasaw, and where the question concerns property[,] the proceeds of a headright[,] granted to him as a Chicasaw." *Id.* at 175. The Attorney General did not invoke any broad principle of territorial jurisdiction in answering that question; rather, he concluded only that Congress, while withholding criminal jurisdiction over any white man, had not chosen to "withhold

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Affairs for review and, if they were deemed valid, payment. *See* Treaties of Oct. 21, 1867, 15 Stat. 581 and 15 Stat. 581; Treaty of Oct. 28, 1867, 15 Stat. 593; Treaty of March 2, 1868, 15 Stat. 619; Treaty of April 29, 1868, 15 Stat. 635; Treaty of May 7, 1868, 15 Stat. 649; Treaty of May 10, 1868, 15 Stat. 655; Treaty of June 1, 1868, 15 Stat. 667; Treaty of July 3, 1868, 15 Stat. 673.

from [the tribe] civil jurisdiction over such white men as of their own free will and accord choose to become members of the nation." *Id.* at 185. Attorney General Cushing stressed that his opinion did *not* concern the tribe's jurisdiction over persons "trading with the Indians, or sojourning among them," but rather was limited to the specific question presented of a white man who had become a member of the tribe. *Id.* at 185.

Once the historical record is examined, it becomes clear that the notion that tribal courts in general or the Three Affiliated Tribes in particular have jurisdiction to adjudicate claims against non-Indians is a modern invention rather than a reflection of historical reality. Indeed, although the Three Affiliated Tribes have had a Constitution since the 1930s, it was not until the 1980s that they claimed any power to adjudicate claims against non-Indians.[15] The tribal code establishing the Fort Berthold Indian Court originally provided for jurisdiction *only* over suits against a member of the tribe or an Indian over whom the court had jurisdiction. The court's jurisdiction over suits between members and non-members was limited to those "brought before the Court by stipulation of the parties." Tribal Code, Ch. II, § 1 (superseded). It was not until sometime in the 1980s that the Tribe's Constitution was amended to provide for the assertion of broad jurisdiction over the activities of non-Indians on the reservation.

In light of the historical record in this particular case, this Court's decision in *Oliphant* compels the conclusion that the Tribes do not have non-consensual civil jurisdiction over

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[15] It is apparent from the Court's opinion in *Three Affiliated Tribes v. Wold Engineering, P.C.*, *supra*, that at the time that case was decided, the tribal code had not yet been amended to provide for tribal court jurisdiction over non-Indians. Indeed, that is why the Tribe sought to bring suit in the North Dakota state court. 476 U.S. at 889.

any kind of a claim against a non-Indian. In *Oliphant*, the Court held unequivocally that "Indian tribes do not have inherent jurisdiction to try and to punish non-Indians." 435 U.S. at 212. The Court arrived at that conclusion after a lengthy examination of the historical record, which demonstrated that the "unspoken assumption," 435 U.S. at 203, in treaty after treaty throughout the nineteenth century had been that tribes did not have judicial authority over non-Indians.

In addition to reviewing the historical record, the Court also considered the intrinsic limitations on tribal authority created by the tribes' dependent status. Noting that the United States has always manifested a "great solicitude that its citizens be protected by the United States from unwarranted intrusions on their personal liberty," the Court concluded that by submitting to the overriding sovereignty of the United States, Indian tribes "necessarily give up their power to try non-Indian citizens of the United States except in a manner acceptable to Congress." *Id.* at 210. The Court observed that "[t]his principle would have been obvious a century ago when most Indian tribes were characterized by a 'want of fixed laws [and] of competent tribunals of justice.'" *Id.* Even though present-day tribal courts have dramatically improved, the Court concluded that the principle "should be no less obvious today." *Id.*

The reasoning applied in *Oliphant* applies with equal force to the Three Affiliated Tribes' assertion of civil jurisdiction over respondents. The historical record, as demonstrated above, shows that both the United States and the Tribes assumed that the Tribes would not have the power to adjudicate civil claims against non-Indians. In addition, since the adoption of the Bill of Rights, the United States has also shown "great solicitude" toward protecting its citizens' property rights against deprivations without due process. At the time they were incorporated into the territory of the United States, the Three Affiliated Tribes did not have a

developed court system and could not have offered non-Indians the due process protections guaranteed to them by the Constitution. Under these circumstances, the only logical conclusion to be drawn from the treaty provisions quoted above is that the Tribes must have given up their power to adjudicate claims against non-Indians.[16]

Having relinquished the power to adjudicate such disputes, the Tribes could not unilaterally re-create it a century later by purporting to expand their jurisdiction to include non-Indians. Instead, only Congress has the power to give the Tribes that authority. Congress has not done so, and therefore the tribal court lacked jurisdiction over the claims at issue in this case.[17]

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[16] We recognize that in *National Farmers Union* this Court declined to apply *Oliphant* to "automatically foreclose" civil jurisdiction over non-Indians in any tribal court. 471 U.S. at 855. But the Court also did not disavow its reasoning in *Oliphant*, leaving the decision with respect to the existence and extent of civil jurisdiction to be decided on a case-by-case basis depending, in large part, on what the historical record showed with respect to each individual tribe. *Id.* at 855-56.

[17] The fact that Congress has authorized funding for tribal courts and that some legislative history repeated the dicta from *Iowa Mutual* about the scope of tribal court jurisdiction is hardly sufficient to constitute Congressional authorization for all tribal courts to claim full territorial sovereignty. Indeed, as demonstrated in respondents' brief, the full legislative history shows that Congress was well aware of the existence of a dispute over the extent of tribal court jurisdiction and did not purport to resolve that dispute. Furthermore, it should be noted that in other contexts Congress has *reduced* the authority of tribal courts, limiting the punishment they can impose on members to one year in prison and a $5,000 fine. 25 U.S.C. § 1302(7). It seems unlikely that Congress intended to restrict criminal jurisdiction over members of the tribe to such relatively small penalties, but at the same time intended to allow tribal courts virtually unlimited discretion to impose huge penalties on non-Indians through the assertion of civil tort jurisdiction.

IV. The Serious Due Process Problems Raised By Allowing Tribal Courts To Assert Jurisdiction Over Tort Claims Against Non-Indians Counsel Against A Broad Expansion Of Tribal Court Jurisdiction.

In *Duro v. Reina*, 495 U.S. 676 (1990), this Court held that tribal courts did not have the power to exercise criminal jurisdiction over Indians who were not members of the tribe. Although Congress subsequently conferred such jurisdiction, the reasoning in *Duro* continues to apply to situations where Congress has not acted. In *Duro*, the Court emphasized the insular nature of tribal courts, noting that they were "influenced by the unique customs, languages and usages of the tribes they serve"; that tribal courts are "'often subordinate to the political branches of tribal governments'"; and that their "legal methods may depend on 'unspoken practices and norms.'" 495 U.S. at 693 (citations omitted). In light of these facts and the limited procedural protections available to criminal defendants in a tribal court, this Court concluded that only members of the tribe, who had a right to participate in tribal government, were subject to the criminal jurisdiction of the tribal courts.

The same concerns apply to tort claims against non-Indians. Non-Indians by definition cannot participate in tribal government. They may also be precluded from participating on juries. Although nearly half of the people who live on the Fort Berthold Reservation are not members of the Tribes, the tribal code limits participation on juries to members. *See* Tribal Code, Ch.2, § 8(c). Such provisions are not uncommon[18]—in spite of the fact that exclusion of non-Indians in

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[18] That was the case in the Crow Tribal Court proceeding where $250 million in damages was assessed against BN. See also *Oliphant*, 435 U.S. at 194 & n.4.

any other court in this country would clearly constitute an equal protection violation. *See, e.g., Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 618-19, 629 (1991); *United States v. Bedonie*, 913 F.2d 782, 795 (10th Cir. 1990), *cert. denied*, 501 U.S. 1253 (1991).

It has long been recognized that local juries are likely to harbor prejudices against outsiders. See *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 347 (1816). Indeed, that is the reason why the federal courts have diversity jurisdiction. Given the small size and insular nature of many reservations, the risk of local bias is particularly acute. Indeed, in many cases it may be virtually impossible to impanel a jury that does not include friends or relatives of the plaintiffs. That was BN's experience in the *Red Wolf* case, where fully one-third of the 65 venire members were friends or relatives of the plaintiffs. Fearful of running out of prospective jurors, the tribal court refused to grant BN's challenges for cause of a number of relatives, resulting in a jury that included relatives of the plaintiffs.

Even if a defendant succeeds in keeping the plaintiffs' friends and relatives off the jury, in a small reservation community there may be strong local biases that preclude an outsider from receiving a fair trial. Again, in the *Red Wolf* case, there were strong sentiments expressed against the railroad during the jury selection process. In *Wilson v. Marchington*, discussed above, strong biases were expressed against truckers who use the interstates running through the reservation.[19] It may well be impossible for even the most conscientious tribal court to protect a non-Indian from such

[19] One prospective juror suggested that he would like to see all motor carriers forced off the reservation, stating that "if I had my way, I'd abandon all the trucks on the reservation."

biases: unlike state courts, tribal courts cannot offer a change of venue to ensure fairness.

Other, more subtle biases may also contribute to an "us-vs-them" mentality, making it difficult for any juror to go against the community by ruling against an Indian plaintiff (or, as in this case, a long-time resident of the reservation) in favor of a non-Indian defendant. Because judges are often under the political control of the tribe, they too may be subject to pressure to rule against outsiders. This situation is anathema to "our system of law [which] has always endeavored to prevent even the probability of unfairness." *In re Murchison*, 349 U.S. 133, 136 (1955); see also *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 825 (1986) ("justice must satisfy the *appearance* of justice").

In addition to the risk of biased decision-making, a non-Indian defendant faces a daunting task simply trying to determine what law is likely to be applied to the claims made against him. In many cases, there may be no guidance available, since many tribal courts have yet to develop a body of common law precedents, applying instead the tribe's own unwritten laws and customs.[20] While it makes perfect sense to use tribal courts to resolve disputes involving members of the tribe, who can be expected to know these laws and customs, subjecting a non-Indian to unknown and unknowable legal standards constitutes a deprivation of the right to due process.

[20] This was a continuing problem throughout BN's *Red Wolf* case. The tribal judge, who was neither a member of the tribe nor an Indian, said at one point that he would apply the English common law. After being informed that wrongful death actions were not recognized at common law, the judge changed course, stating that he was applying principles of Crow law, even though there is no written Crow law dealing with the tort of wrongful death.

The inherent difficulty in allowing tribal courts to adjudicate claims against non-Indians is further exacerbated by the absence of any clear constraints to ensure fairness in the tribal courts. An "outsider" sued in state court is protected by the ability to remove the case to federal court and by the availability of direct review of federal constitutional claims in this Court. By contrast, there is no removal jurisdiction with respect to cases brought in tribal courts. There is also no direct review of tribal appellate court judgments in this Court to ensure that federal constitutional rights are respected.

In fact, as unwilling defendants in a tribal court, non-Indians may not have any constitutional rights at all. Congress enacted the Indian Civil Rights Act of 1968 to protect the rights of all litigants who appear in tribal courts. But in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), this Court held that there is no private right of action to enforce the ICRA and that the plaintiff was required to bring her equal protection challenge to tribal membership requirements in tribal court. The proponents of broad tribal court jurisdiction take the position that *Santa Clara Pueblo* precludes non-Indian litigants from challenging a tribal court judgment in federal court on the ground that it was secured in violation of the ICRA. While we disagree with that interpretation, the extent of review available to non-Indian litigants outside the tribal court system—and therefore the existence of any constraint to abide by fundamental principles of fairness—remains far from clear.[21]

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[21] Litigants may have an opportunity to challenge the fairness of tribal court judgments if and when the tribal court plaintiff seeks to enforce the judgment against assets located outside the reservation. However, tribal court proponents once again take the position that the review available is extremely limited and that tribal court judgments are entitled to the same full faith and credit as state court judgments.

The federal policy of fostering tribal self-government is served by the development of tribal court systems to resolve *intra-tribal* disputes. But that policy does not require the federal courts to bless the kind of injustice likely to result when tribal courts assert jurisdiction over tort claims against non-Indians involved in accidents on federal rights-of-way.

V. This Court Should Act To Resolve The Uncertainty Surrounding Tribal Court Jurisdiction.

The lack of any clear rules for judging the extent of tribal court jurisdiction, when combined with the tribal court exhaustion rule first announced in *National Farmers Union*, has created a quagmire for litigants on both sides of a dispute arising out of an accident on the reservation. As this very case illustrates, disputes over the appropriate forum can consume years of expensive litigation. That hurts not only defendants, but also plaintiffs who seek a prompt resolution of meritorious claims.[22]

Although petitioners and their amici contend that they are seeking only "concurrent" jurisdiction over tort claims on the reservation, the exhaustion rule has been applied so broadly in the lower courts that there is no such thing: if an accident occurred on a reservation, the litigants are likely to be forced, willing or not, to sue "first" on the reservation to let the tribal court decide whether it has jurisdiction. Thus, even Indian plaintiffs who would prefer to litigate in another

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[22] Plaintiffs whose claims are weak or even frivolous may choose to sue or threaten to sue in tribal court in order to gain a "home court" advantage that, at the very least, might persuade the defendant to pay a substantial settlement. Indeed, this very case appears to fall into that category. The liability facts seem weak, and the claims of Mrs. Fredericks' children to over $1 million for loss of parental consortium (J.A. 9) are claims that would not survive a motion to dismiss in a North Dakota state court. *See Butz v. World Wide, Inc.*, 492 N.W.2d 88 (N.D. 1992) (refusing to recognize a child's claim for loss of parental consortium).

forum—and thus avoid the necessity of enforcing a tribal court judgment outside the reservation—have found the doors of the federal courts closed to them, on the ground that they are required to bring their claims first in tribal court. *See, e.g., Wellman v. Chevron U.S.A., Inc.*, 815 F.2d 577 (9th Cir. 1987).

This is a situation that cries out for clear, bright-line rules. For all of the reasons outlined above, tribal courts should not be allowed to assert jurisdiction over non-Indians in cases arising out of accidents on federally-granted rights-of-way absent their explicit consent or express congressional authorization.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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